IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-1534

MICHAEL R. McMAHON - - - Petitioner

VERSUS

KENTUCKY BAR ASSOCIATION - Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

BRIEF FOR RESPONDENT IN OPPOSITION

LESLIE G WHITMER
Director-Counsel
Kentucky Bar Association
403 Wapping Street
Frankfort, Kentucky 40601
Counsel for Respondent

May 2, 1979

ROBERTS PRINTING CO., FRANKFORT, KY.

INDEX

CITATIONS

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-1534

MICHAEL R. McMAHON - - - Petitioner

VERSUS

KENTUCKY BAR ASSOCIATION - Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Supreme Court of Kentucky (Petition, Appendix A1-A4) is reported at 575 S.W. 2d 453.

JURISDICTION

The jurisdictional requisites are not adequately set forth in the Petition. This case does not arise under 28 U.S.C. § 1254 (1), because it is not a review from a Court of Appeals. Jurisdiction would appear to be by virtue of the provisions

of 28 U.S.C. § 1275 (3).

QUESTIONS PRESENTED

1. Whether the decision below or the record raises the questions presented in the petition.

2. Whether the disciplinary proceedings of the Kentucky Bar Association and the Supreme Court of Kentucky denies petitioner substantive due process of law under the Fourteenth Amendment of the Constitution of the United States or inflicted cruel and unusual punishment under the Eighth Amendment to the United States Constitution.

3. Whether the evidence supports the findings and judgment of the Supreme Court of Kentucky.

RULES INVOLVED

Former RAP 3.310....Mental Disability After Misconduct Charged.

If, after a charge of unprofessional conduct has been filed against an attorney, the Trial committee has reason to believe and, after a hearing before that committee, finds that the respondent is of unsound mind, mentally ill, mentally defective or for whom a committee has been appointed, or addicted to intoxicants or drugs to such an extent that, in the judgment of the trial committee, he is incapable of conducting a proper defense to the charge against him, the Trial committee shall recommend to the Board and the Board shall recommend to the Court that the respondent be suspended from the practice of law. If the Court orders his suspension, it shall also direct that all further proceedings on the charge be held in abeyance until it shall appear to the Court, upon application made by the respondent that he is mentally capable of conducting a proper defense to the charge in question; therefore, a hearing on the charge shall be held as provided by the Rules relating to disciplinary cases.

If the Trial committee concludes that the charges have not been sustained, or, having been sustained, do not warrant suspension or disbarment, then the respondent shall be restored to membership in the Association if and when he has satisfied the Trial committee, the Board and the Court by clear and convincing evidence that he has been so completely cured of such insanity, mental illness, mental defectiveness, or addiction that there is little or no likelihood of a recurrence of the condition.
(Deleted 12-31-77)

SCR 3.130 ABA code of professional responsibility recognized as authority

Except for ethical consideration and disciplinary rules insofar as they conflict with the opinion in the Unitel States Supreme Court in *Bates v. State Bar of Arizona,* the court recognizes and accepts the principles embodied in the American Bar Association's code of professional responsibility as a sound statement of the standards of professional conduct required of members of the bar, and the board may cause to be tried all charges brought under this code as well as charges for other unprofessional or unethical conduct tending to bring the bench and bar into disrepute.

SCR 3.165 Temporary suspension by the Supreme Court

On petition of the inquiry tribunal authorized by its chairman and supported by an affidavit demonstrating facts personally known to affiant, showing that an attorney appears to be misappropriating funds he holds for others to his own use, or otherwise improperly dealing with said funds, or has been convicted of a crime as set out in Rule 3.320, or is mentally disabled or is addicted to intoxicants or drugs, and upon a finding that reasonable cause exists to so believe and to believe that unless such order is issued a real and present danger exists that a sum not readily recoverable by those entitled thereto has been or may be misappropriated, or it appears from

the record of such conviction that he has so acted as to gravely put in issue whether he has the moral, physical or mental fitness to continue to practice law, or is so addicted to the use of intoxicants or drugs or is so mentally disabled as to so believe, the court may issue an order, with such notice as the court may prescribe, imposing temporary conditions of probation on said attorney or temporarily suspending said attorney, or both. Any such order of temporary probation or suspension which restricts the attorney in dealing with said funds, shall, when served on any bank maintaining any account upon which said attorney may make withdrawals, serve as an injunction to prevent said bank from making further payment from such account or accounts on any obligation except in accordance with restrictions imposed by the court, and shall direct such bank not to disclose (except to those entitled to withdraw from the account or accounts or to receive payment of such obligation, or upon the express written permission of at least one of such persons as to each such account or obligation) that such order has been received or the contents thereof. Any fees tendered to such attorney thereafter shall be deposited in a trust fund from which withdrawals may be made only in accordance with restrictions imposed by the court. The attorney may for good cause request dissolution or amendment of any such temporary order by petition filed with the court, a copy of which will be served on the director. The court may refer such petition for dissolution to a person who possesses the qualifications of a trial commissioner under Rule 3.250 sitting as a special commissionre for immediate hearing. The special commissioner shall hear such petition forthwith and submit his report and recommendation to the court with utmost speed consistent with due process. Upon receipt of the foregoing report, the court may modify its order if deemed appropriate until final disposition of all pending disciplinary charges against said attorney.

SCR 3.370 Board's action on trial commissioner's report and procedure in the court

(1) Upon receipt of the report of the trial commissioner, the board shall promptly consider and act upon the entire record. Only the president, the president-elect, the vice president and the fourteen duly elected members of the board from their respective Supreme Court districts shall be eligible to be present, participate in, and vote on any displinary case. Any member who has participated in any phase of a disciplinary case submitted to the board under this rule, or has been challenged on grounds sufficient to disqualify a circuit judge shall be disqualified; and the Chief Justice shall appoint a member to consider and act on the case.

(2) Nine of those qualified to sit in a disciplinary matter must be present to constitute a quorum for consideration of such matters.

(3) The board shall decide, by a roll call vote, whether the respondent is guilty or not guilty. If the respondent be found guilty, the board shall then decide by a roll call vote the disciplinary action. Both the findings and any disciplinary action must be agreed upon by 9 or 3/4 of the members of the board present and voting in the proceedings, whichever is less. The result of each of the two votes shall be recorded in the board's minutes, together with a decision of the board giving its findings of fact and conclusions of law and reasons therefor as action and decision of the board, and the director shall sign and file with the director an order setting forth the action and decision of the board, and th edirector shall mail copies of such order and decision together with a copy of the trial commissioner's report, to the parties or their counsel and to each member of the tribunal.

(4) The board will, in its decision, state wherein it differs with the findings of fact of the trial commissioner, and will state the discipline, if any.

(5) The entire record, together with a certified bill for costs and expenses incurred in the investigation preliminary to, and in the conduct of, the proceedings, shall be filed with the clerk by the director.

(6) The respondent may file a notice for the court to review the board's decision within thirty (30) days after the board's decision is filed with the clerk stating reasons for review accompanied by a brief supporting his position on the merits of the case. The director may file a brief within thirty (30) days thereafter in support of the board's decision. Before the notice for review can be filed, the respondent shall furnish a bond with surety acceptable to the clerk, conditioned that if the principal in the bond be disciplined by the court, he will promptly pay all costs incurred in the proceeding including those certified under Rule 3,370. If he files his response *in forma pauperis*, no bond shall be required.

(7) The court may within forty (40) days of the filing of the board's decision notify both the director and respondent that it will review the board's decision. If the court so acts, the director and respondent may each file briefs within forty (40) days with no right to file reply briefs unless by order of the court whereupon the case shall stand submitted. Thereafter, the court shall enter such orders or opinion as it deems appropriate on the entire record.

(8) If the respondent does not file a notice of review or the court does not notify the parties of its review under paragraph (7) of this rule, the court shall enter an order adopting the decision of the board relating to all matters.

(9) When the respondent is proceedel against by warning order, the notice in paragraph (3) and paragraph (7) of this rule shall be deemed to have been served thirty (30) days after the date of the making of the warning order.

SCR 3.380 Degrees of discipline

Upon finding by the board or court under the provisions of Rule 3.370 of guilt or unprofessional conduct, discipline may be administered by way of admonition, private reprimand, public reprimand, censure, suspension

from practice or disbarment. If a private reprimand is issued, it shall not be made public and shall be transmitted only to the respondent, or his attorney, and to the attorney for the complainant, and the court shall order the record sealed subject to reopening only on order of the court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

*United States Constitution, Amendment VIII*s

Excessive bail shall not be required, nor excessive fines imposed nor cruel and unusual punishment inflicted.

United States Constitution, Amendment XIV, Section 1:

. . . . Nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the law.

United States Code

28 U.S.C. § 1254. Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon a petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;

(3) By certification at any time by a court of appeals of any question of law in any civil or criminal case

as to which instruction are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

28 U.S.C. 1257. State courts; appeal; certiorari

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

COUNTERSTATEMENT OF THE CASE

On March 17, 1977, the Inquiry Tribunal of the Kentucky Bar Association filed a charge against Petitioner (Respondent below) consisting of three separate counts of unethical and unprofessional conduct. Count I alleges that in March, 1974, one Mary C. Phillips employed petitioner to file a personal injury action seeking the recovery of damages arising out of a traffic accident. Petitioner falsely advised and assured Mrs. Phillips on numerous occasions that he had filed a lawsuit on her behalf. On or about October 23, 1976, petitioner admitted to Mrs. Phillips that he had neglected to file the lawsuit and that the statute of limitations had expired. Count II charges that petitioner loaned Mrs. Phillips $600 with the unlerstanding that petitioner would be repaid out of any proceeds recovered through settlement of the lawsuit. Count III alleges that on or about October 23, 1976, petitioner wrote a check payable to Mrs. Phillips in the amount of $4,321.50. The check was written on petitioner's attorney at law, escrow account and petitioner did not inform Mrs. Phillips as to whose funds she was receiving from the escrow account. There was no evidence introduced to show the lawsuit had been settled.

On April 7, 1977, petitioner filed an answer to the charge admitting the allegations contained in each count of the charge except the allegation in Count I that petitioner made false representations to his client. On April 7, 1977, petitioner also filed a motion to make the charge more specific by specifying the Disciplinary Rules of the American Bar Association's Code of Professional Responsibility which it was alleged that respondent had violated. Respondent filed a reply to motion on April 8, 1977, stating the provisions of the Code that had been violated.

A Trial Committee was appointed on April 28, 1977, to conduct an evidentiary hearing. The hearing was held on July 29, 1977, and respondent (complainant below) was ordered to file a brief within twenty days of receiving the transcript with petitioner being allowed to file a reply brief within twenty days thereafter. Petitioner did not testify at the hearing. On August 16, 1977, the depositions of two witnesses were taken by petitioner to be filed in the record when

transcribed. Respondent filed its brief on August 31, 1977, and petitioner filed a brief in reply on September 27, 1977.

The Trial Committee filed its report with the Director on February 1, 1978, finding petitionre not guilty as to Counts I and III and recommended that these two counts of the charge be dismissed. The Trial Committee further found petitioner guilty as to Count II and recommended that he be privately reprimanded.

On July 22, 1978, by a roll call vote of 13-0, the Board of Governors found petitioner guilty as charged on all three counts and recommended to the court that petitioner be suspended from the practice of law for one year and be required to pay the costs of this action. (Appendix to Response, p. 1A-2A). The Board of Governors filed its findings of fact, conclusions of law, and recommendation on August 28, 1978, and on the same day the Director notified petitioner by certified mail of the decisions by the trial committee and the Board of Governors.

Petitioner filed a timely notice for review pursuant to SCR 3.370 (6) and respondent filed a brief in response on October 17, 1978. On November 21, 1978, the court rendered its opinion holding that the record was more than sufficient to sustain the Board of Governor's findings of fact. The Supreme Court of Kentucky adopted the Board of Governors recommendation and ordered respondent suspended from the practice of law for a period of one year.

Petitioner filed a petition for rehearing which was overruled. The Supreme Court of Kentucky and this Court have stayed the operation of the state court mandate pending consideration of the Petition for a Writ of Certiorari.

REASONS FOR DENYING THE WRIT

The respondent, Kentucky Bar Association, respectfully

requests that this Court deny the Petition for Writ of Certiorari, seeking review of the Supreme Court of Kentucky's opinion in this case.

The issues raised by the petitioner in his Petition for Writ of Certiorari concern novel constitutional arguments not involving the procedures utilized by the Supreme Court of Kentucky in disciplining an officer of the court but rather the degree of discipline given a lawyer by the court.

Each issue raised by petitioner will be answered briefly after a short consideration of the general issues in the case.

I

THE DECISION BELOW WAS BASED ON AN ADEQUATE AND INDEPENDENT NON-FEDERAL GROUND

The Court's jurisdiction has been improperly raised under 28 U.S.C. § 1254 (1). The jurisdiction of the court could be properly raised only under the provisions of 28 U.S.C. § 1257 (3). This case is not a review from a court of appeals but rather from a state court. For the purposes of this argument and to prevent delay in the court's final review of this petition, the respondent will assume the Court has jurisdiction of the case.

During the course of the disciplinary proceeding before the respondent and the Supreme Court of Kentucky never once did respondent raise a federal constitutional issue in any response, answer, briefs, petitions, or hearings before the Inquiry Tribunal, Trial Committee, Board of Governors or the Supreme Court of Kentucky. Counsel for respondent has carefully reviewed all transcripts, depositions, pleadings, briefs and petitions filed in the state court and has failed to find any mention of "due process" and "cruel and unusual punishment" arguments raised in the disciplinary proceeding. In fact, the complaint was filed against peti-

tioner on November 15, 1976; however, respondent did not learn that petitioner was relying on his alcoholic condition as a mitigating circumstance in his disciplinary case until his trial hearing on July 29, 1977.

Respondent has included in the Appendix to this response the arguments of petitioner's two (2) lawyers representing him at different stages of the state court proceeding clearly showing that at no time were federal constitutional issues raised even though petitioner had many occasions to raise the issues.

Appendix II — Petitioner's preliminary answer dated December 10, 1976, stating the complaint raised legal issues not ethical considerations. (Appendix to Response, Page 3-A).

Appendix III — Respondent's assistant director on February 7, 1977, impressed on petitioner the seriousness of the matter and asked for a more complete response. (Appendix to Response, Page 4-A).

Appendix IV — Petitioner's response on February 8, 1977, to the assistant director of respondent stating that the complaint should be dismissed for failure to state a cause of action stating that more than a single act or omission for neglect constituted grounds for discipline and further stating hat the complaining party had been given a $4,321.50 check. (Appendix to Response, Page 5-A).

Appendix V — A general response to the displinary charge admitting the allegations of the charge but denying any misrepresentations. (Appendix to Response, Page 6-A).

Appendix VI — Opening statement of petitioner at trial hearing on July 29, 1977, raising for the first time the allegation that petitioner had a problem with alcohol. (Appendix to Response, Page 7-A).

Appendix VII — Portion of argument from brief of petitioner by first counsel before a trial committee stating it would, in effect, be harsh and inhuman to harshly discipline an attorney for behavior that is the direct result and manifestation of disease but raising no federal constitutional question whatsoever. (Appendix to Response, Page 8A-9A).

Appendix VIII — Portions of Notice for Review and Brief on Behalf of Respondent setting forth all defenses and mitigation circumstances while stating that a one year suspension period was too severe but never raising a federal constitutional issue of any kind. The notice was filed by petitioner's second counsel. (Appendix to Response, Page 10A-13A).

Appendix IX — Portion of Petition for Rehearing arguing that one year suspension period was too severe and that petitioner's alcoholism was a mitigating circumstance but failing to raise any federal constitutional issues. The petition was filed by petitioner's second counsel. (Appendix to Response, Page 14-A).

It is clear that petitioner's third counsel filing the Petition for Writ of Certiorari has failed to raise any federal constitutional issues before this court that have been raised before the state court below. Petitioner was given every opportunity before the state court to raise federal constitutional issues but he failed to do so. The petition for Writ of Certiorari must be denied on this basis.

> "It is essential to the jurisdiction of the Supreme Court under § 1257 that a substantial federal question has been properly raised in the state court proceeding."[26]
>
> • • • •
>
> "For purposes of certiorari under subsection (3), the validity of such a treaty or statute must have been 'drawn in question' or a federal title, right, privilege or immunity must have been specially set up or claimed.' These

phrases, 'drawn in question' and 'specially set up or claimed', are substantially identical in nature, both of them referring to the raising of a substantial federal question in the correct manner."

Stern & Gressman, *Supreme Court Practice,* 5th edition (1978) at page 208.

It is interesting to note footnote 36 shown above stating:

"The admonition bears repeating 'that if you are about to commence litigation (in a state court) in which there may be involved, then or ultimately, a question arising under the Constitution or laws of the United States, you must raise the federal question at the outset and not as an afterthought after you have lost below. By that time you are almost always too late . . . unless you build the record in your state litigation so that you *do* make a federal case out of it, you not only do not have a rosy chance of review, you don't have any chance at all.' Wiener, *Wanna Make a Federal Case Out of It?* 48 A.B. A.J. 59, 60, 62 (1962)."

Even though petitioner's petition for writ of certiorari must be denied on the foregoing argument, respondent will answer the constitutional question raised in the petition.

II

THE DISCIPLINARY PROCEEDINGS OF THE KENTUCKY BAR ASSOCIATION AND THE SUPREME COURT OF KENTUCKY DID NOT DENY PETITIONER SUBSTANTIVE DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES NOR INFLICT CRUEL AND UNUSUAL PUNISHMENT ON PETITIONER UNDER THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION

Disciplinary cases in the Commonwealth of Kentucky have always been civil by nature as a matter of sound state law. *Commonwealth ex rel Buckingham v. Ward,* Ky., 267 Ky. 677 (1937). Petitioner on page 15 of his petition states that *In re Ruffalo,* 390 U.S. 544, 551 (1968), holds that state

disclipinary proceedings are "of a quasi-criminal nature". The *Ruffalo* case dealt with a federal disbarment proceeding not a state proceeding. This Court had before it the state proceeding but denied the Petition for Writ of Certiorari. *Ruffalo v. Mahoning County Bar Association,* 379 U.S. 931 (1964). Petitioner never contends that he has not received procedural due process under the Rules of the Supreme Court of Kentucky, but argues that substantive due process has not been given because a one year suspension under the facts of this case denies due process of law. While this Court has never, to respondent's knowledge, held a state disciplinary proceeding lacks substantive due process, it is certainly clear this case raises no important constitutional issues warranting review by this Court in setting a precedent to grant review of the opinion of the Supreme Court of Kentucky.

Petitioner's due process argument is novel. He has cited no legal authority applying a substantive due process standard to suspension of alcoholic lawyers, where the illness has been arrested or not, nor has he cited legal authority showing that such a suspension period constitutes "cruel and unusual punishment."

This Court has consistently held that states have a stron interest through their courts in disciplining their members. The Court stated in *Goldfarb v. Virginia State Bar, et al.,* 955 S. Ct. 2004 (1975) at p. 2016:

"We recognize that the States have a compelling interest in the practice of professions within their boundaries, and that as part of their power to protect the public health, safety, and other valid interests, they have broad power to establish standards for licensing practitioners and regulating the practice of professions. We also recognize that in some instances the State may decide that 'forms of competition usual in the business world may be demoralizing to the ethical standards of a pro-

fession.' *United States v. Oregon State Medical Society*, 343 U.S. 326, 336, 72 S. Ct. 690, 697, 96 L. Ed. 978 (1952), see also *Semler v. Oregon State Board of Dental Examiners*, 294 U.S. 608, 611-613, 55 S. Ct. 570, 571-572, 79 L. Ed. 1086 (1935). The interest of the States in regulating lawyers is especially great since lawyers are essential to th primary governmental function of administering justice, and have historically been 'officers of the courts.' See *Sperry v. Florida*, 373 U.S. 379, 383, 83 S. Ct. 1322, 1325, 10 L. Ed. 2d 428 (1963); *Cohen v. Hurley*, 366 U.S. 117, 123-124, 81 S. Ct. 954, 958, 6 L. Ed. 2d 156 (1962); *Law Students Research Council v. Wadmand*, 401 U.S. 154, 157, 91 St. Ct. 720, 723, 27 L. Ed. 2d 749 (1971). In holding that certain anticompetitive conduct by lawyers is within the reach of the Sherman Act, we intend no diminution of the authority of the State to regulate its profesions"

The Supreme Court of Kentucky through SCR 3.130 has adopted the provisions of the American Bar Association's Code of Professional Responsibility as a sound statement of the standards of professional conduct required of members of the bar and disciplinary charges may be tried under this code as well as for other unprofessional or unethical conduct tending to bring the bench and bar into disrepute. The Code of Professional Responsibility clearly states:

"DR 6-101 (A) (3)

(A) A lawyer shall not:

* * *

(3) Neglect a legal matter entrusted to him."

The Supreme Court of Kentucky in the opinions cited in Footnote 4 of the opinion of this case cites numerous examples of its neglect cases stating that without exception, each lawyer was suspended from the practice of law for a term commensurate with his degree of neglect. (Appendix to Petition, page A 3-4). While our state court is strict on

neglect, it gives discipline on a case by case basis. In the case of *Kentucky Bar Association v. Littleton*, Ky., 560 S.W. 2d 5 (1977), the court found that Littleton had in one case failed to timely file a workman's compensation claim and his client had some difficulty in locating him. There was no misrepresentation made to the client. The court ordered a two year suspension period. Littleton could show no mimtigating circumstances and failed to answer the disciplinary charge. On the other hand, petitioner has proved that his neglect was caused by the disease of alcoholism. The Court was very lienent and, in view of the mitigating circumstances, gave a one year suspension period.

The Supreme Court of Kentucky in SCR 3.380 states that a lawyer found guilty of unprofessional conduct may be disciplined by way of admonition, private reprimand, public reprimand, censure, suspension from practice or disbarment. The court has clearly followed ts rule in ordering a one year suspension period. In disciplinary cases the report of the Trial Committee and the decision of the Board of Governors are advising only; therefore, the court is the ultimate fact finder and orders all discipline. *Kentucky Bar Association v. Stivers*, Ky., 475 S.W. 2d 900, cert. denied, 406 U.S. 968 (1977). The Board of Governors and the Court commended petitioner for his rehabilitation as "a step in the right direction and if such conduct continues should be considered if and when respondent (McMahon) files for reinstatement." The Court also stated that the practice of law demands a meet and lively responsibility and if petitioner does not possess it he belongs in some other line of work. (Appendix to Petition, page A-3).

The Supreme Court of Kentucky certainly recognizes the need for a rule regarding the mental disability of and addiction to intoxicants or drugs, by members of its bar. SCR

3.165 provides for its Inquiry Tribunal to petition it for imposng temporary conditions of probation on an ill member or temporary suspending the member or both. Had petitioner raised his drinking problem before the tribunal as a defense to the complaint or subsequent cahrge, the case may have been treated under this rule or its predessor RAP 3.310. Certainly, in a state court civil proceeding, it would be beyond the imagination to say that the provisions of the Eighth Amendment to the United States Constitution could even be remotely involved.

Petitioner's disciplinary case has been properly processed under the rules of the Supreme Court of Kentucky to a proper conclusion. There are no conflicts in opinions among state courts or federal courts on the law of this case. The Supreme Court of Kentucky has used its sound discretion in what should be done with petitioner in relation to his practice of law in its state courts bearing in mind the interest of the public who has suffered as a result of his neglect. Beyond all doubt, this case has not acquired the importance necessary to warrant review by this Court. The decision of the court below is not erroneous nor shocking. There are no factual issues present. There is the presence of an adequate non-federal ground for the decision based on Kentucky law. This Court would not excercise its jurisdiction to reexamine the judgment of the Supreme Court of Kentucky as to whether a lawyer should be placed on probation or suspended from practice for one year. There were no federal or state constitutional issues raised before the lower court and there are no valid federal constitutional questions raised before this Court.

III

THE DECISION BELOW IS CORRECT AND THERE ARE NO JUSTICIABLE REASONS FOR GRANTING THE WRIT

The neglect of a client's cause is a serious matter in the Commonwealth of Kentucky. The record before the Supreme Court of Kentucky in this case goes beyond mere neglect. Petitioner neglected his clients case and then lied to her by stating a lawswuit had been filed when he had not done so. The aggrieved client gave the following testimony before the Trial Committee (Transcript, pages 41-42):

Q. 134 Now, one other question. You went to Mr. McMahon in March, 1974. When did it come to your attention, when did you first have knowledge that he had not filed this suit on your behalf?

A. Well, there were accusations made to me by friends that there's something wrong. Something is wrong, Mary. I said no, that these things just take a long time. When I put my full confidence and put it in his lap, I said take it, take care of it. It was in 1976 when I got aware of this, when Mr. Huff, a friend I called, and checked with the courthouse, and he said he could not find where there had been anything filed.

Q. 135 Then following that telephone call to the courthouse, did you call Mr. McMahon and discuss it with him?

A. Yes, sir.

Q. 136 What did he tell you?

A. That he had filed one.

Our Code of Professional Responsibility was breached by this misrepresentation:

"DR 1-102 Miscounduct.

(A) A lawyer shall not:

(4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation."

Petitioner not only was neglectful and made a misrepresentation to his client, but he made unethical loans of money to his client for general living expenses with payment to come from the proceeds produced in the lawsuit. This conduct clearly violates the Code of Professional Conduct:

"DR 5-103 (B):

> While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to his client . . . ."

In addition, petitioner in making restitution to his client, presented her with a check in the amount of $4,321.50 drawn on his attorney at law escrow account. There was no evidence presented to show that any settlement had been reached nor that petitioner had deposited his own money in the escrow account and then disbursed it to the client. Petitioner did not testify at his hearing..

Petitioner's case was more than the single neglect case. His misconduct extended beyond a missed deadline that could be attributed to his addiction to alcohol. His misrepresentations, unethical loans to his client and misuse of his law office escrow account was conduct which is highly unprofessional. A one year suspension period was a generous finding in petitioner's favor. The Supreme Court of Kentucky found that the evidence was more than sufficient to sustain the one year suspension period. (Appendix to Petition, page A-3). The public interest must be protected. A suspension period contacted with reinstatement procedures will reasonably assure the public that it will not be subject to further harmful conduct at petitioner's hands. There is valid reason for the court's action.

The Per Curiam Opinion of the Supreme Court of Kentucky is based soundly on facts in the record of pleadings, briefs and evidence before it The court and the Board of Governors supported by the court considered all defenses offered by petitioner and clearly stated so. A fair reading of the entire record supports the entire opinion of the court. The opinion clearly cites the evidence it found in the record to support its findings. The court applied a clear standard to the facts and its grave effect on the image of the bench and bar.

CONCLUSION

It is respectfully submitted that this Petition for Writ of Certiorari should be denied because no federal constitutional issues were raised at any point in the lower court and for the other reasons stated.

Respectfully submitted

LESLIE G. WHITMER
Director-Counsel
Kentucky Bar Association
403 Wappin Street
Frankfort, Kentucky 40601
Counsel for Respondent

APPENDIX

APPENDIX I

MINUTES AND CERTIFICATION OF PROCEEDING BY BOARD OF GOVERNORS KENTUCKY BAR ASSOCIATION

IN RE: MICHAEL R. McMAHON

I, B. M. Westberry, President, do certify:

This cause came on for consideration by the Board of Governors of the Kentucky Bar Association, 13 members entitled to vote on disciplianry matters being present, and all other persons and staff absent from the room.

The record of the case was physically present.

On motion made and seconded, the report of the Trial Committee was received.

The case was discussed, the discussion being confined to the record.

After full consideration, a roll call vote was taken on the issue of guilt or innocence. The result:

Guilty—13

Not Guilty—0

Abstaining—0

After discussion was held on the appropriate punishment, a roll call vote was held with a majority of 13 recommending to the Supreme Court of Kentucky that the respondent, Michael R. McMahon, be suspended from the practice of law for one (1) year and required to pay the costs in this action.

Pursuant to SCR 3.370, a written decision of the Board was ordered to be filed with the Director.

This certificate and minutes of proceeding, after being inspected by each member voting, are made a part of the record in this case and the minutes of the Association.

This 22nd day of July, 1978.

B. M. WESTBERRY, President

ATTFST:

LESLIE G. WHITMER, Director

APPENDIX II

December 10, 1976

Mr. Leslie Whitmer, Director

Kentucky Bar Association

315 West Main Street

Frankfort, Kentucky 40601

RE: Michael McMahon

Complaint of Mary C. Phillips

Dear Les:

Mr. McMahon has just left the rather voluminous complaint of Ms. Phillips against him with me and has asked that I acknowledge receipt of same. A preliminary perusal of the complaint that Ms. Phillips has filed indicates to me that this is a case in which she should pursue her legal remedies and not a case of unethical conduct on Mr. McMahon's part.

I would appreciate it if you would ask the Inquiry Tribunal to treat this as our preliminary answer in this matter.

Sincerely,

Robert E. Delahanty

RED:je

APPENDIX III

February 7, 1976

CONFIDENTIAL

Robert E Delahanty, Esquire
701 West Walnut Street, Suite 401
Louisville, Kentucky 40202

Re: Michael R. McMahon, Esquire

Dear Mr. Delahanty:

In regard to the response you filed for the above attorney to Mrs. Phillips' complaint, we would point out that neglect has historically constituted grounds upon which disciplinary sanctions may be imposed.

We would certainly appreciate knowing whether, in fact, suit was not filed as alleged in the complaint. Mrs. Phillips alleges she received some $600 from Mr. McMahon which was an advance on her forthcoming settlement. It is also of concern that the check Mr. McMahon wrote to Mrs. Phillips for $4,321.50 dated October 23, 1976, was written on his escrow account.

You certainly are not obligated to add anything to the previous response, but this letter only provides another opportunity to help the Inquiry Tribunal fully realize the factual situation.

Sincerely,

John T. Damron

Assistant Director

JTD/sp

APPENDIX IV

February 8, 1977

Mr. John T. Damron
Assistant Director
Kentucky Bar Association
Frankfort, Kentucky 40601

RE: Michael R. McMahon, Esquire

Dear Mr. Damron:

I am in complete disagreement with the first paragraph of your letter and feel that a reading of informal opinion 1273 of the American Bar Association enclosed herewith certainly says affirmatively that there must be more than a single act or omission for negligence to constitute grounds for discipline.

It seems to me under the circumstances that Mrs. Phillips' complaint should be dismissed for failure to state cause of action.

You might be interested in knowing that Mrs. Phillips has certified the $4,321.50 check but that we have been unable to ascertain as yet whether or not she has cashed the check.

Thank you for your cooperation.

Sincerely,

Robert E. Delahanty

RED:je
Enc.

APPENDIX V

SUPREME COURT OF KENTUCKY

KENTUCKY BAR ASSOCIATION - - Complaintant

vs. RESPONSE

MICHAEL R. McMAHON - - - - Respondent

* * *

For response herein, the respondent states as follows:

1. He admits the allegations contained in paragraphs 1, 2, and 3 except any allegations as to the falsity of representations made by the respondent to Mary C. Phillips.

ROBERT E. DELAHANTY
COUNSEL FOR RESPONDENT
Suite 401, 701 West Walnut Street
Louisville, Kentucky 40203
583-8308

It is hereby certified that a copy hereof was on April 5, 1977, mailed to Mr. Leslie Whitmer, Director, Kentucky Bar Association, 315 West Main Street, Frankfort, Kentucky 40601.

ROBERT E. DELAHANTY

APPENDIX VI

KENTUCKY BAR ASSOCIATION

v. MICHAEL R. McMAHON

SUPREME COURT OF KENTUCKY

No. 78-SC-455-KB

(Transcript of Trial Hearing, July 29, 1977, Page 46-)

OPENING STATEMENT

BY MR. DELAHANTY:

My contention about this case, number one, we admit that the suit was never filed, and there was negligence in failing to file it. We feel that does not come under the ethics of profession. It's something where, as he certainly said to his client, we are in an adversary position, and suggested that she go see another lawyer. We think that comes under the the informal opinion 1273.

Mike and I have talked at recess, and I feel, in my opinion, lawyers make the lousiest witnesses that I know of. So, I have come to the conclusion that I'm not going to put Mr. McMahon on the stand at all. What I'm going to do is to show in terms of litigation of his negligence of this case, in the very brief time we are speaking of, that Mike was involved in a problem with alcohol.

APPENDIX VII

MICHAEL R. McMAHON'S BRIEF BEFORE TRIAL COMMITTEE, FILED 9-27-77, Pages 7-8

ALCOHOLISM

It is submitted here that there is an issue presented by the record in this case that was almost totally disregarded by the brief of the Bar Association.

The record clearly shows that the Respondent, during the relevant period of time, was ill with active alcoholism. The record further shows that before the complaint herein was brought, the Respondent, by self-help and membership and participation in Alcoholics Anonymous, has recovered from the debilitating effects of the disease of alcoholism. While it must be conceded that an alcoholic cannot literally be cured so that he may again drink alcoholic beverages in moderation, the disease and the devastating effects of it can be abated by total abstinence. This, the Respondent has accomplished.

The very conduct of the Respondent that is complained of was, by the testimony of Dr. Baker, a normal system or manifestation of the disease.

The record clearly demonstrates that, after the Respondent attained his sobriety, his conduct and behavior was consistent with the highest professional and moral standards.

It would be most unjust to harshly discipline an attorney for behavior that is the direct result and manifestation of disease. The restitution made to Mrs. Phillips, and Respondent's candid admission to her that he had been negligent and that their interests were adverse, is ample evidence of the Respondent's recovery from the disease, and his usual

professional conduct.

Surely the harsh and inhuman position taken by the brief for the Bar Association should be rejected. At page four of their brief, they suggest that the Respondent's illness "should not be looked upon as an excuse for misconduct, but rather a buttress for disciplinary sanctions." Such a position would require a rejection of enlightened medical and legal thinking. Alcoholism is a disease recognized as such by both the American Medical Association and the American Bar Association. Some state Bar Associations have established positive action programs to help alcoholic members attain recovery from the progressive debilitating effects of the disease.

The record in this case supports a finding and conclusion that the negligence of the Respondent was the result of his illness and is not typical of his usual standard of profesional conduct.

APPENDIX VIII

KENTUCKY BAR ASSOCIATION

V. MICHAEL R. McMAHON

SUPREME COURT OF KENTUCKY

No. 78-SC-455-KB

(Notice for Review and Brief on Behalf of Respondent)
(Page 3-5)

ARGUMENT

A. Negligence and Inattention of the Type Described in This Record Is Insufficient to Warrant Disciplinary Action By the Court.

The whole concept of discipline for negligence and inattention is troublesome to the writer of this petition. To put it bluntly, there are cases and there are cases. This coupled with the imprecision and cagueness of the canon relating to inattention to a client's affairs compounds the problem. In considering the case at bar, we think the Court and the Board of Governors overlooked material facts and factors in this record. They are:

(a) Respondent's admission of the facts alleged with the exception of the falsity of the representation.

(b) He made his client whole and there is no contention to the contrary.

(c) He did not attempt to thwart the investigation and he was cooperative.

(d) He was beset with an illness which accounted for

any negligence that he may have performed.

(e) He did not attempt to shield himself from any civil claim for malpractice by taking a release from his client when he made redress to her.

(f) He has not been the subject of previous disciplinary actions.

(g) There is no evidence that his performance as a lawyer before he became afflicted with alcoholism was other than good and a credit to the bar.

(h) He has participated timely in these proceedings and has not ignored the charges made and has timely presented his defenses to them.

This subject is exhaustively annotated in 96 A.L.R. 2d 823.

Without detailing the entire annotation, we find the following to be considered aggravating circumstances.

(a) Ignoring the client's request for information or for settlement. Obviously, there was plenty of contact with the client because respondent lent her $200 on three occasions.

(b) False representation to the client. This Court found that he had told the client that he was working on the case. Respondent may well have been working on the case and still not filed the suit timely.

(c) Attempts by attorneys to thwart or impede the investigation. None of that is present in this case.

(d) Attorney's prior history of misconduct. None has been alleged or proven here.

The following are considered mitigating circumstances:

(a) Personal misfortune of an attorney.

(b) Attorney's good character.

(c) Attorney's previous record.

(d) Absence of evil or fraudulent intent.

(e) Admission of negligence.

(f) Willingness to reimburse client for any loss suffered.

Here, the respondent paid his client for the loss suffered and, apparently, did not seek repayment of the $600 loaned.

(Pages 13-14)

ARGUMENT II

In the Event the Court Disagrees With Argument I, and Finds That the Respondent Was Guilty of Professional Misconduct, Then the Punishment Imposed Was Too Severe.

Respondent sincerely believes that the charges were not established by a preponderance of the evidence. The Trial Committee was not required to believe Mrs. Phillips' statement that respondent told her that the suit had been filed. This portion of the argument relates to the severity of the punishment in the event the Court disagrees with the previous argument made by the respondent. First, it seems undisputed that respondent was afflicted with alcohol during the period involved. Second, it appears that respondent acted honorably and in accord with the discipline rules in correcting whatever wrong he may have done to Mrs. Phillips. Third, he is presently a member of Alcoholics Anonymous which takes considerable courage in itself. Fourth, everyone seems to be sympathetic with respondent's plight. Even the Board of Governors who imposed the one-year suspension commented on his rehabilitation efforts and asked that they be taken into consideration on reinstatement. We

are of the opinion that a one-year suspension is far too severe. In *Kentucky Bar Association v. Booth, supra,* the penalty was six months for conduct far worse than that engaged in by respondent and there is no evidence that Booth attempted to redress any of the wrongs committed by him. In *Kentucky Bar Association v. Graves,* Ky., 556 S.W. 2d 890, Graves stole from his client via the escrow account and was censured.

Suspension or disbarment of a lawyer is not for the purpose of vengeance or punishment. It is recognition by the Court that at a given time a lawyer lacks sufficient character and moral fitness to retain his license. We think the evidence here is devoid of facts which call for a conclusion that respondent lacks character or moral fitness to continue the practice of law. He has not stolen, he has not been convicted of a serious crime, nor has he done any of the things that usually cause this Court to impose suspension or disbarment.

Even if the Court believes respondent's guilt has been established by a preponderance of the evidence, it is our view that a reprimand would be a sufficient sanction. Very possibly, the Court might consider suspension or probation of the suspension on condition of exemplary behavior. This is a sanction which has never been imposed by the Court but one possibly within its inherent power. Compare *Nicholson v. Board of Judicial Retirement and Removal,* Ky., 562 S.W. 2d 306. At any rate, this is a case where the writer has no hesitency in requesting that respondent be treated mercifully.

APPENDIX IX

KENTUCKY BAR ASSOCIATION

V. MICHAEL R. McMAHON

SUPREME COURT OF KENTUCKY

No. 78-SC-455-KB

(Petition for Rehearing, Page 10)

B. The Punishment Is Severe and Grossly Out of Proportion to What Occurred.

We cannot reconcile the degree of discipline with *Kentucky Bar Association v. Graves,* Ky., 556 S.W. 2d 890. We are also of the opinion, and this is our fault, that the Court did not give more weight to the defense of alcoholism which is set forth in KRS 222.011, Section 3, and this statute says:

> "'Alcoholism' means a medically diagnosable disease characterized by chronic, habitual or periodic consumption of alcoholic beverages resulting in the (a) substantial interference with an individual's social or economic functions in the community, or (b) the loss of powers of self-control with respect to the use of such beverages."

With the mitigating factors present and the aggravating factors absent, respondent is of the opinion that no suspension is justified and that his conduct warranted a public reprimand at the most. Respondent did not personally profit from this transaction and he acted honorably and ethically with his client when he confessed the fact that he had not filed the suit. The conduct here does not bring the Bench and Bar into disrepute but rather demonstrates respondent's integrity in facing up to a dereliction and to a disease and trying to do the right thing about it.

CERTIFICATE OF SERVICE

I, Leslie G. Whitmer, Counsel for the Kentucky Bar Association, Respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 2nd day of May, 1979, I served on the Honorable Burton Milward, Jr., 319 Kentucky Home Life Building, Louisville, Kentucky 40202, Attorney for Petitioner, a copy of this brief by mailing same, postage prepaid.

Leslie G. Whitmer

LESLIE G. WHITMER